STATE OF MICHIGAN

IN THE SUPREME COURT

DAVID J. McQUEER,

Plaintiff-Appellee,

v

PERFECT FENCE COMPANY,

Defendant-Appellant.
_____/

Supreme Court Case No._____

Court of Appeals
Case No. 325619

Grand Traverse Circuit Court
Case No. 14-030287-NO

DEFENDANT-APPELLANT PERFECT FENCE COMPANY'S APPLICATION FOR LEAVE TO APPEAL

Proof of Service

GARAN LUCOW MILLER, P.C.
John E. McSorley (P17557)
David M. Shafer (P34787)
Christian C. Huffman (P66238)
Attorneys for Defendant-Appellant
Perfect Fence Company
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207-2641
Telephone: (313) 446-1530
Email: jmcsorley@garanlucow.com
Email: dshafer@garanlucow.com
Email: chuffman@garanlucow.com

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STATEMENT IDENTIFYING THE JUDGMENT APPEALED FROM AND INDICATING THE RELIEF SOUGHT

Defendant Perfect Fence Company seeks to appeal from the April 19, 2016 unpublished opinion of the Court of Appeals which was rendered by Judges Douglas Shapiro, Joel Hoekstra, and Michael Talbot. (Ex 15: *McQueer v Perfect Fence Co*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2016 (Docket No. 325619); 2016 Mich App LEXIS 761.)

Grand Traverse Circuit Court Chief Judge Thomas G. Power granted defendant Perfect Fence Company's motion for summary disposition on the basis that the plaintiff's tort claims against his employer, defendant Perfect Fence Company, are barred by the exclusive remedy provision in the Michigan Worker's Disability Compensation Act (WDCA), MCL 418.131(1). Judge Power determined that neither of two statutory exclusions to the exclusive remedy provision applied in this case. Circuit Judge Power also denied plaintiff's motion to amend his complaint to add a claim for intentional tort under the intentional tort exception to the exclusive remedy provision. (Ex 11; see also Ex 9-10.)

Although the April 19, 2016 judgment of the Court of Appeals affirms one of Circuit Judge Power's three holdings, it reverses two of Judge Power's holdings and remands the case to the circuit court for further proceedings.

More specifically, as relevant to this application for leave to appeal, the Court of Appeals judgment finds, first, that Judge Power erred in holding that the exclusion in MCL 418.171 to the exclusive remedy provision in MCL 418.131(1) does not apply in this case, and second, that Judge Power committed an abuse of discretion in holding that it would be futile for plaintiff to amend his complaint to add a claim of intentional tort against his employer under the intentional tort exception in MCL 418.131(1) to the exclusive remedy provision.

This case presents two important issues to the jurisprudence of the state of Michigan. The

two issues concern the proper interpretation of Michigan's Worker's Disability Compensation Act. Both issues are central to delineating the extent to which the WDCA permits an employer that indisputably maintained a policy of worker's compensation disability insurance to be sued in tort by an employee who was injured in the course of his employment. As such, both issues are of considerable jurisprudential significance to Michigan's employment relations. And both issues pertain to matters that regularly occur in Michigan's employment environment. Thus, both issues merit consideration by, and guidance from, this Court, and should not be left to an unpublished and erroneous Court of Appeals decision.

The first issue is whether an injured employee can sue his employer in tort, even though the employer indisputably maintained a policy of worker's compensation insurance and the employee admittedly received worker's compensation insurance benefits under the policy. It is believed that no opinion from this Court or the Court of Appeals has ever interpreted the WDCA as permitting an employee to do so. Yet, as explained in this application, the Court of Appeals in this case held that such an employee can sue his or her employer, based on an erroneous interpretation of MCL 418.171. Taken to its logical conclusion, the Court of Appeals' decision effectively eviscerates the unambiguous exclusive remedy provision contained in MCL 418.131(1), thereby rendering null the very tort immunity for insured employers that the Legislature intended the WDCA to provide.

The second issue is whether an injured employee can maintain an action against his employer under the "intentional tort" exception to the WDCA's grant of tort immunity to the employer, even though, as in this case, the employee admitted that his coworker did not intend to injure him, and further admitted that his employer specifically instructed both him and the coworker *not* to engage in the activity that resulted in the employee's injury precisely because that activity was too dangerous and was prohibited. The Court of Appeals held that MCL 418.131(1) permits the employee to do

so, again based on an erroneous interpretation of the WDCA. And again, taken to its logical conclusion, the Court of Appeals' decision essentially renders null the very tort immunity for insured employers that the Legislature intended the WDCA to provide.

Defendant-appellant Perfect Fence Company now asks this Court for the following relief:

(1) peremptorily reverse the judgment of the Court of Appeals and reinstate the order (Ex 11) of the circuit court granting summary disposition to defendant Perfect Fence and denying plaintiff's motion to amend complaint, or

(2) grant this application for leave to appeal. MCR 7.305(H)(1), 7.316(A).

GROUNDS SUPPORTING GRANT OF APPLICATION FOR LEAVE TO APPEAL

This is an appeal of a decision of the Court of Appeals (Ex 15) that is clearly erroneous and will cause material injustice, and that creates conflict with existing Michigan jurisprudence affecting the Michigan Worker's Disability Compensation Act (WDCA). MCR 7.305(B)(5).

The Court of Appeals (Judges Douglas Shapiro, Joel Hoekstra, and Michael Talbot) erroneously reversed two holdings of the Grand Traverse Circuit Court (Chief Judge Thomas G. Power). The first holding it reversed concerns the "statutory employer" or "principal contractor" statute in the WDCA, MCL 418.171; and the second holding it reversed concerns the "intentional tort exception" to the exclusive remedy provision in the WDCA, MCL 418.131(1).

Under the exclusive remedy provision in the WDCA, MCL 418.131(1), the right to worker's compensation benefits is the exclusive remedy of an injured employee against his or her employer.

However, under MCL 418.641(2), there is an exclusion from the exclusive remedy provision for situations involving a "principal" employer (also called a "statutory" employer) under MCL 418.171 who uses coercion, intimidation, or deceit to encourage a person to pose as a contractor for the purpose of allowing the principal employer to evade its own obligations under MCL 418.171 or

its own obligations under MCL 418.611 to maintain its own worker's compensation insurance policy. In that situation--where a principal employer (or statutory employer) uses coercion to encourage a person (an employee) to pose as a contractor for the purpose of allowing the principal employer to evade its own obligation to maintain its own worker's compensation insurance policy--an injured employee of the person who posed as the contractor can sue the principal (or statutory) employer for tort damages, notwithstanding the exclusive remedy provision.

Further, under MCL 418.131(1), there is an exception to the exclusive remedy provision for situations involving employers who committed an intentional tort against the injured employee. An "intentional tort" is defined in the statute as requiring that the employer specifically intended an injury to the plaintiff, and the statute states that an employer shall be deemed to have intended an injury if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. In that situation, an injured employee can sue his or her employer for tort damages, notwithstanding the exclusive remedy provision.

Regarding the first holding of the Court of Appeals, concerning the "statutory employer" exclusion from the exclusive remedy provision, the Court of Appeals reversed the circuit court and held that the "statutory employer" statute applies in this case. There are published (and unpublished) appellate opinions, however, that have clarified that the "statutory employer" statute applies only in situations involving a principal contractor who contracts with another contractor-employer who has employees but who fails to maintain worker's compensation insurance for injuries sustained by those employees. In such a situation, the principal contractor, also called the statutory employer, of the contractor-employer's injured employee, must provide worker's compensation benefits to the contractor-employer's injured employee. But in this case, there is no contractor-employer with uninsured employees. Rather, there is an employer, who is defendant Perfect Fence Company, and

an injured employee or contractor, who is plaintiff McQueer, and he has no employees, injured or otherwise. Moreover, plaintiff McQueer was paid all worker's compensation benefits due to him (for medical bills, lost wages, and related benefits) by defendant Perfect Fence Company's worker's compensation insurer. Thus, as the circuit court correctly held (see Ex 10, pp 38-39), and as the Court of Appeals incorrectly did not hold (Ex 15, p 6), this case does not implicate the statutory employer or principal employer statute at all. Simply stated, that statute is not applicable in this case. The Court of Appeals opinion in this case, if left unreversed on this issue by this Court, will create confusion in the law regarding the proper scope of the application of the "statutory employer" or "principal contractor" statute, MCL 418.171. It will lead circuit courts to apply the "statutory employer" or principal employer statute to situations which do not involve any "statutory employer" or "principal employer" at all and which the Legislature did not intend for it to be applied.

Furthermore, even if the "statutory employer" statute could properly have been extended to apply in this case (which it could not), it was also improperly interpreted and applied by the Court of Appeals to cause material injustice to defendant Perfect Fence as well as to other similarly situated employers. The Court of Appeals reversed the circuit court and concluded that, under MCL 418.171(4), defendant Perfect Fence can be held liable to plaintiff McQueer in tort damages (pursuant to MCL 418.641) because of "divergent proofs" as to whether defendant Perfect Fence used deceit in telling plaintiff that Perfect Fence did not have worker's compensation insurance coverage, and, according to the Court of Appeals, "[i]t can be reasonably inferred that the purpose of the deceit was to prevent plaintiff from making a claim for worker's compensation benefits, which would in turn allow defendant to avoid liability under sections 171 or 611 of the WDCA." (Ex 15, p 6.) Yet, in so holding, the Court of Appeals judicially rewrote MCL 418.171(4), because that statute does not allow a statutory employer (or principal employer) to be held liable in tort to an

injured employee unless it engaged in deceit to encourage that employee to pose as a contractor *"for the purpose of evading this section or the requirements of section 611*." (Emphasis added.) Here, defendant Perfect Fence could not have committed any deceit for the purpose of evading its requirement of maintaining insurance to cover its worker's compensation liability, because it always had and always maintained worker's compensation insurance. The statute does not include in its language anything about subjecting a statutory employer to tort liability for deceit committed "for the purpose of preventing plaintiff from making a claim for worker's compensation benefits," as stated by the Court of Appeals as its rationale for applying MCL 418.171(4) in this case. The Legislature could have included this "preventing-from-making-a-claim-for-worker's-compensation-benefits" reason as a basis for imposing tort liability against a statutory employer in MCL 418.171(4), but it did not do so. The Court of Appeals in essence judicially added that language to the statute, which is improper.

Regarding the second holding of the Court of Appeals concerning the "intentional tort" exception to the exclusive remedy provision in the WDCA, MCL 418.131(1), the Court of Appeals reversed the circuit court and held that the circuit court abused its discretion when it denied plaintiff's motion to file an amended complaint to add a claim of intentional tort in order to seek tort damages (as an exception to the exclusive remedy provision) against defendant Perfect Fence. According to the Court of Appeals, the facts show that defendant Perfect Fence could be held liable for tort damages to plaintiff because defendant Perfect Fence had knowledge that injury to plaintiff was certain to occur and willfully disregarded that knowledge, as required under § 131(1), when it subjected plaintiff to a "continuously operative dangerous condition." (Ex 15, pp 7-10.) However, the allegedly continuously operative dangerous condition is one which plaintiff McQueer's boss, Bob Krumm (who is the co-owner of defendant Perfect Fence Company), specifically instructed both

plaintiff McQueer and his coworker/supervisor Mike Peterson *not* to do, which instruction they both ignored and directly violated. Plaintiff McQueer himself admitted that no one at Perfect Fence had ever intended to harm him, and that, basically, the accident that resulted in his injury occurred only because Mike Peterson, who was using the bucket of a Bobcat to push down a fence post, mistakenly "over-calculated" in the amount of pushing needed, and the post unexpectedly encountered a water pocket in the ground, so that the post descended faster than plaintiff and Peterson had anticipated it would and ended up suddenly hitting plaintiff in the head. At that time, plaintiff was next to the fence post and beneath the bucket of the Bobcat, and he was simultaneously talking to his girl friend on his cell phone, when the bucket unexpectedly descended faster than anyone had anticipated and he was suddenly hit on the head by the bucket. This scenario does not rise to the level of an "intentional tort" committed by plaintiff's employer against him for purposes of allowing plaintiff to sue his employer under the "intentional tort" exception to the exclusive remedy provision.

Moreover, this Court's opinions explicitly state that "[a] continuously operative dangerous condition may form the basis of a claim under the intentional tort exception *only if* the employer knows the condition will cause an injury *and refrains from informing the employee about it*." *Alexander v Demmer Corp*, 468 Mich 896; 660 NW2d 67 (2003) (emphasis added), citing *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 178; 551 NW2d 132 (1996). In this case, plaintiff himself testified that his employer (his boss, the co-owner of defendant Perfect Fence Company, Bob Krumm) had already specifically instructed him and the other employee working with him at the time of the accident *not* to use the bucket of the Bobcat to push down any fence post. In other words, plaintiff's employer did not *refrain* from informing plaintiff about the danger of using the bucket of a Bobcat to push down a fence post; instead, his employer did the opposite: Mr. Krumm directly *informed* plaintiff about the danger and further instructed him *not* to use the bucket of a Bobcat to

push down a fence post, because to do so would be too dangerous. Mr. Krumm's exact and unambiguous words, according to plaintiff, were as follows: "[t]hat's dangerous as hell" and "you guys better not do that." (Ex 8A, p 76.) Therefore, the Court of Appeals erred in holding that plaintiff can sue defendant Perfect Fence for tort damages under a theory of his having been subjected to a "continuously operative dangerous condition" that he was not informed of.

Accordingly, defendant Perfect Fence asks this Court to peremptorily REVERSE the judgment of the Court of Appeals as to the two issues raised in this application and to reinstate the circuit court's order as to these two issues; or, in the alternative, to grant this application for leave to appeal.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in reversing the circuit court's holding that the exclusive remedy provision of the Workers Disability Compensation Act, MCL 418.131(1), bars plaintiff's lawsuit for tort damages against his employer for injuries he sustained while in the course of his employment, because the exclusion to the exclusive remedy provision in MCL 418.171 (known as the "statutory employer" or "principal employer" exclusion) does not apply in this case?

- Defendant-appellant answers: Yes
- Plaintiff-appellee answers: No

II. Did the Court of Appeals err in holding that the circuit court abused its discretion in denying plaintiff's motion to amend his complaint to add a claim of intentional tort under the intentional tort exception to the exclusive remedy provision of the Workers Disability Compensation Act, MCL 418.131(1), because that claim is futile?

- Defendant-appellant answers: Yes
- Plaintiff-appellee answers: No

INTRODUCTION

Perfect Fence Company is a family-owned business that has been in business for about forty (40) years. It has never had an employee injured in the course of its business, except for plaintiff David McQueer in this case.

Plaintiff David McQueer was injured in the course of his employment for defendant Perfect Fence Company as he was installing a fence post with a coworker at a work site in Leelanau County in January 2014. He was hit in the head by the bucket of a Bobcat as his coworker was using the bucket to push down a fence post into the wet and cold January ground--something that both he and plaintiff were already instructed never to do by their boss.

As a result of this work-related injury, plaintiff has been paid worker's disability compensation benefits for his medical bills and weekly wage loss by Perfect Fence Company's worker's compensation insurer, Accident Fund Insurance Company. Perfect Fence Company has maintained its worker's compensation insurance coverage through Accident Fund since 2007.

Although plaintiff received and continued to receive worker's disability compensation benefits from his employer's worker's compensation insurer, he nonetheless filed this lawsuit against his employer, Perfect Fence, seeking more money in tort damages for his work injury.

The Grand Traverse Circuit Court granted defendant Perfect Fence Company's motion for summary disposition, finding that plaintiff's claim for tort damages against his employer was barred by the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1). The circuit court also found that plaintiff's allegations and the facts, when viewed in a light most favorable to plaintiff, did not rise to the level of constituting an "intentional tort" under the intentional tort exception to the exclusive remedy provision.

The Court of Appeals (Judges Shapiro, Hoekstra, and Talbot) affirmed in part and reversed

in part the circuit court's determinations and ordered the case to be remanded to the circuit court for further proceedings.

Defendant Perfect Fence asks this Court to peremptorily REVERSE the judgment of the Court of Appeals as to the two issues raised in this application and to reinstate the circuit court's order as to these two issues; or, in the alternative, to grant this application for leave to appeal.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Perfect Fence Company has been in the business of installing fences for about forty years. (Ex 8B, pp 6,16, 24, 29.) It is a family owned business that is owned by two brothers, Richard ("Dick") Krumm and Robert ("Bob") Krumm. (Id.) Depending on the weather, Perfect Fence Company employs between two and ten people, including the Krumm brothers, but during the working season, it usually employs six or eight. (Ex 8B, pp 6-7, 40-41.) During the winter season, however, the employees, except for the Krumm brothers and a secretary, stop working and receive unemployment benefits. (Id.)

In its four-decades-long history, nobody working for Perfect Fence Company, except for the plaintiff in this case, has ever been injured while on the job. (Ex 8B, p 29.)

Plaintiff David McQueer was born on December 18, 1972. (Ex 8A, p 14.) His education was non-standard as he quit the alternative high school he was attending, and much later, in 2008, he obtained a GED diploma. (Ex 8A, pp 17-18, 127.) Plaintiff was convicted of retail fraud for stealing merchandise when he was 16, and he used marijuana in his 20s and drank alcohol. (Ex 8A, pp 24, 28, 107-108.) He was treated in a psychiatric hospital in 1991, was subsequently treated for depression, and in 2000 he received Social Security Disability benefits due to depression. (Ex 8A, pp 41-42, 49-50, 127.) In 2012, he tried to commit suicide. (Ex 8A, p 47.) Plaintiff was involved in charges of aggravated domestic violence against four different girl friends at four different times,

in 1999, 2001, 2004, and 2007. (Ex 8A, pp 23-27.) Plaintiff also incurred four convictions between 1998 and 2009 for operating a motor vehicle while under the influence of alcohol. (Ex 8A, pp 21, 27-31.) Plaintiff was divorced twice (Ex 8A, p 16), and at the time of his deposition on November 4, 2014, he was living with another woman (Ex 8A, pp 15-16, 20-21).

Plaintiff did not share a close relationship with his father, who was an alcoholic and who died in 2000. (Ex 8A, pp 32-33.) Instead, he shared a close relationship with Dick and Bob Krumm (and especially with Bob Krumm) who are the owners of Perfect Fence Company. (Ex 8A, pp 11-12, 32-33, 35-36, 120-121; Ex 8B, p 6.) According to both plaintiff and Bob Krumm, they were "like family" to each other (Ex 8B, pp 11-12, 32-33, 35-36, 120-121; Ex 8B, pp 16, 45-49, 70-71), and according to plaintiff, Bob Krumm was "more of a father [to me] than my dad was" (Ex 8A, p 33).

Plaintiff worked on and off for many years with Bob Krumm at Perfect Fence Company, going back to the early 1990s, according to plaintiff. (Ex 8A, pp 6, 35-36, 73, 86, 112, 120, 131; Ex 8B, pp 7, 16-17, 41, 69.) Bob and his brother Dick helped plaintiff and taught plaintiff everything he (plaintiff) knew about building fences. (Id.) Plaintiff was proud of his ability to perform high quality work, which he learned how to perform from Bob and Dick Krumm. (Id.)

After plaintiff was released from prison in August 2011 and his later release from jail in April 2013, he was still on parole and was still wearing a monitoring tether and was still reporting to a parole officer. (Ex 8A, pp 11-12, 19.) At that time, Bob Krumm allowed plaintiff to move into and live in the shop trailer on the property of Perfect Fence Company. (Ex 8A, pp 11-12, 19-20, 27-28.) Also at that time, plaintiff needed to have a job as part of his parole. (Ex 8A, pp 19-20.) And so in about June 2013, Bob Krumm once again gave plaintiff a job.[1] (Ex 8A, pp 10-12, 20; Ex 8B, p 8.)

[1] Bob Krumm would also lend plaintiff money (Ex 8A, pp 109, 111-112, 114; Ex 8B, pp 18-19, 50); would also let plaintiff borrow tools owned by the company for plaintiff's personal use (Ex 8B, pp 12, 64-66); and would also give plaintiff rides to and from work every day, since plaintiff did not have a valid driver's license (Ex 8A, pp 21, 90, 131). As Clare Booth Luce penned, "No good deed goes unpunished." That adage fits our facts.

After June 2013 when plaintiff again started working for Perfect Fence Company, he was paid an hourly wage of $10.50 in weekly paychecks.[2] (Ex 8A, 36, 58, 115-116; Ex 8B, pp 8-9.) Plaintiff knew that no taxes were being deducted from his weekly paychecks. (Ex 8A, p 58.) Plaintiff performed labor by building and installing fences as directed for Perfect Fence Company, and he was paid an hourly wage in weekly paychecks by Perfect Fence Company; and plaintiff considered himself to be an "employee" of Perfect Fence Company. (Ex 8A, pp 36, 58, 72-73, 76-78, 116-117; Ex 1E, ¶¶ 3, 15.) Copies of plaintiff's weekly paychecks and the checks provided to him as advances are in the record. (See Ex 1D.)

About seven months after plaintiff began working again for Perfect Fence Company while on parole, and more specifically on January 14, 2014, he was injured in the course of his employment while he was installing a fence in Leelanau County with coworkers named Mike Peterson and Raymond Hauser. (Ex 8A, pp 7, 9, 71-72.) According to plaintiff, Mike Peterson was acting as the supervisor of the team on this particular fence-installation job. (Ex 8A, pp 77-78, 82.)

At the time that plaintiff was injured on the job, he was not only actively working with Mike Peterson, who was operating a Bobcat vehicle in a swampy area, but plaintiff was also simultaneously talking to his girl friend, Barb Crosley Edgecomb, on his hands-free personal smart phone. (Ex 8A, pp 59-60, 71-72, 75-76, 82-83.) In other words, plaintiff was installing a fence post and was talking on his cell phone with his girl friend at the same time. (Id.)

According to plaintiff, he was injured when his coworker Mike Peterson used the bucket on

[2] According to both Bob Krumm of Perfect Fence Company (Ex 8B, pp 13-14, 41, 57) and Barbara McCullen (Ex 5B, pp 22, 34-35), the bookkeeper for Perfect Fence Company, plaintiff asked that no taxes or social security withholding be taken out of his weekly paychecks. Whether or not plaintiff asked for no taxes to be withheld from his paychecks, however, is irrelevant. Plaintiff knew that no taxes were being deducted from his weekly paychecks. Plaintiff acknowledged that after he was released from prison and thereafter released from jail and was given a job by Bob Krumm, he was always paid his wages in weekly paychecks. He acknowledged that "I never got taxes taken out." (Ex 8A, pp 58, 115-116.)

the Bobcat that Mike Peterson was operating to push a 4" x 4" x 8' fence post vertically down about three feet into the wet ground, resulting in Mike Peterson unintentionally causing the bucket to descend faster than had been anticipated and then hitting plaintiff in the head with the bucket. (Ex 8A, pp 75-88.) There is no doubt that this injury to plaintiff was neither foreseen nor intended by Mike Peterson, because plaintiff himself testified that it was not foreseen and was not intended. (Ex 8A, pp 82, 88.) Plaintiff testified that "he [Mike Peterson] didn't intentionally hit me," and plaintiff agreed that even he "didn't foresee ever getting bapped in the head like [I] did." (Ex 8A, pp 82, 88.)

In addition, plaintiff testified that Bob Krumm had found out the day or two before this accident occurred that Mike Peterson was using the bucket of the Bobcat in this way to push down a fence post, and that Bob Krumm got mad and specifically told Mike Peterson not to do that anymore, because it was dangerous. (Ex 8A, p 76; see also Ex 8B, pp 25-29.) Unbeknownst to Bob Krumm, however, Mike Peterson did not follow the direction of his boss, Bob Krumm, and instead he decided to do exactly what his boss specifically told him *not* to do: namely, he decided to use the Bobcat's bucket to push a fence post down into the ground. (Ex 8A, pp 76-78; Ex 8B, p 69.)

Perfect Fence Company maintained a policy of worker's disability compensation insurance from Accident Fund Insurance Company at the time of plaintiff's work injury in January 2014 .[3] (Ex 8A, pp 43, 48-49; Ex 8B, pp 42-43, 49, 72; Ex 5B, pp 8, 40.) Perfect Fence had maintained its workers disability compensation insurance policy continuously with Accident Fund Insurance

[3] Michigan's Worker's Disability Compensation Act (WDCA) states that all worker's compensation insurance policies in this state "shall" cover "all" the employees of the employer. MCL 418.621(1), (2), states that "[e]very contract for insurance of the compensation provided in this act . . . shall be subject to the provisions of this act," and "each insurer issuing an insurance policy to cover any employer . . . shall insure, cover, and protect in the same insurance policy, all the businesses, employees, enterprises, and activities of the employer."). "The Legislature's use of the word 'shall' generally indicates a mandatory directive, not a discretionary act," *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013); and "the terms 'all' or 'any' . . . provide for the broadest possible obligation." *Miller-Davis Co v Ahrens Const Co*, 495 Mich 161, 175; 848 NW2d 95 (2014).

Company since 2007. (Ex 1A, p 2, ¶ 4; Ex 5A, p 2, ¶¶ 4, 8.) Moreover, plaintiff has been paid, and is being paid, worker's disability compensation benefits under Perfect Fence Company's worker's disability compensation insurance policy from Accident Fund Insurance Company for his work injuries of January 2014. (Ex 8A, pp 44-45, 71, 136; Ex 1B, pp 5-6, ¶ 14a.) In addition to plaintiff's medical bills having been paid by Perfect Fence Company's worker's disability compensation insurer, plaintiff was also receiving $257 per week in worker's disability compensation insurance wage-loss benefits from the worker's compensation insurer. (Id.)

Plaintiff testified in part as follows:

Q. **And you're currently receiving work comp benefits from Accident Fund?**

A. **Yes**, sir.

* * *

Q. Is the Accident Fund paying for that treatment?

A. Yes, sir.

* * *

Q. I understand that according to the complaint, when the accident occurred the Bobcat was used as kind of a hammer, if you will?

A. It wasn't a hammer. You would set it on top of the post and slide it down, and push it down--'cause we were in the wet muck area, or where the cattails are.

Q. All right. So rather than a hammer-and-nail effect it was more of, set it on top and use pressure--

A. And if he--and if Mike [Peterson] didn't get it--if it has resistance and wouldn't get down he would tap it down.

Q. Okay. All right. This particular method with the Bobcat, had you used that before on jobs?

A. Oh, yeah. Well, on metal posts we have, sometimes, pushed them down with the Bobcat or something like that, until **Bob [Krumm] found out and Bob got mad and told us not to do it no more.** And he was pissed at Mike for it.

Q. After--after this accident?

A. No, **he told us before the accident**--Bob was pissed that Mike was even doing something like that.

Q. You're claiming that Bob found out that you guys were doing this before the accident?

A. Oh, yeah, he was mad. He told Mike not to do it.

Q. When was this?

A. Must have been around that same day or two . . . . **Bob's like, "That's dangerous as hell, you guys better not do that,"** you know.

Q. How did Bob find out you were doing that?

A. . . . I think I told Bob or Ray did, I'm not really sure. And that's when he said, "You guys don't do that no more like that."

* * *

Q. Okay. Well, let me just get this straight: Mike continues to do something that Bob has allegedly advised against and said, "Don't do it that way." You don't have the ability to say, "Hey, Mike, Bob just told us--I don't want to piss him off because if he finds out our jobs could be at stake? You never had that discussion with Mike?

A. Nope.

Q. All right. **You just went along with it?**

A. **Yup.**

* * *

Q. . . . **was the auger available for use at the time of the accident?**

A. **Yup.**

Q. Okay. Did you at any time say, "Mike, why don't we use the auger?"

A. No, nope.

* * *

Q. So the auger was on the job site, you guys didn't use it; correct?

A. For most of the job, yes, we did.

Q. You did use it?

A. Yeah, for most of the job.

Q. Why wasn't it used for this particular fence post then?

A. 'Cause we could dig 8, 10 inches and Mike said it was easier--and it was easier--to push them down with the bucket.

Q. So this was easier than the auger?

A. Right.

Q. All right. And you never questioned it? **You never said to Mike, "You know, we shouldn't do this. Bob's already got an issue with it?"**

A. **We all knew he did.**

Q. Were you and Mike--did you get along?

A. Yeah.

Q. **So you don't think he purposely did this to you?**

A. Who, Peterson?

Q. Yeah.

A. **Oh, no, I love Mike.** I mean he just--the way it happened it was wrong, but **he didn't intentionally hit me.**

* * *

Q. Tell me what happened? . . . .

A. . . . . I'd sit behind the post on my knees and butt, and he would come up to it, in front of it (indicating) right here--and the post is between me and him--and with the edge of the bucket he would push it down. Well, we were out there in the middle of January, it's cold, it's windy, it's--I mean, you got the Bobcat coming in and out of there with the tracks and all that. And when he slipped back--and when he came back up, I don't know if **he miscalculated**. . . . So when he went back, he came back forward like this and then **he over-calculated it. And when he brought**

the bucket down it hit a water pocket or something and that's when it came all the way down . . . hit me on top of the head.

* * *

Q. **So the post went down a lot further than anyone had anticipated?**
A. **Oh, yeah, yeah.**
Q. Okay. **And that was unforeseen to you?**
A. **Yeah.**

* * *

Q. And how long were the posts that you guys were using?
A. I think they were eight feet 4-by-4's.

* * *

Q. So it was essentially five foot above the ground?
A. Roughly, yeah.

* * *

[T]he problem was is the farther you got down the faster the water would come up. And . . . Mike said if we push it down, we won't have to loosen the ground up and it'll suck up and around and all that.

* * *

Q. What are you currently getting right now from worker compensation?
A. 257 a week. [Ex 8A, pp 44-45, 59-60, 75-76, 78-84, 86-87,136 (emphasis added).]

Moreover, Robert "Bob" Krumm, the half owner of Perfect Fence, testified that in the entire forty year history of the existence of Perfect Fence Company, there had never been any injuries, and that plaintiff and Mike Peterson should not have been using the bucket of a Bobcat to push down a fence post but rather should have done the job the right way, the way they had been trained to do it, by using hand diggers--"the way we've been doing it for years." (Ex 8B, pp 29, 55.)

Perfect Fence Company brought a motion for summary disposition on the basis that plaintiff's lawsuit seeking more money in tort damages from his employer stemming from an injury that was incurred in the course of his employment, and for which he had been paid worker's disability compensation benefits, was barred by the exclusive remedy provision in the worker's disability compensation act, and did not fall within that provision's sole exception for intentional torts. MCL 418.131(1). (Ex 1.) The exclusive remedy provision provides that worker's disability compensation insurance benefits shall be an injured employee's exclusive remedy against an

employer unless the employer specifically intended to injure the plaintiff. MCL 418.131(1). Plaintiff filed a response brief. (Ex 2.) Perfect Fence Company filed a reply brief. (Ex 3.) Moreover, plaintiff filed an additional brief (Ex 4), and Perfect Fence Company filed a supplemental brief (Ex 5). Plaintiff also filed a supplement to his additional brief. (Ex 6.)

In addition, plaintiff filed a motion to amend complaint seeking to add claims against Perfect Fence Company for intentional tort (under the intentional tort exception to the WDCA's exclusive remedy provision, MCL 418.131(1)) and breach of employment contract. (Ex 7.) Perfect Fence Company filed a response brief. (Ex 8.)

A hearing was conducted by Grand Traverse Circuit Judge Thomas G. Power on November 7, 2014, concerning defendant Perfect Fence Company's motion for summary disposition based on the exclusive remedy provision. (Ex 9.) At the hearing, plaintiff argued that defendant Perfect Fence Company should not be allowed to raise the statutory immunity from tort liability granted to employers by the exclusive remedy provision in the worker's disability compensation act. (Ex 9.) According to plaintiff, defendant Perfect Fence Company had allegedly failed to specifically inform its worker's disability compensation insurance carrier, Accident Fund Insurance Company, that it had hired plaintiff as a new employee in June 2013 shortly after he had been released from prison, and before plaintiff was injured in the course of his employment on January 14, 2014. According to plaintiff, defendant Perfect Fence had failed to inform its workers compensation insurer about plaintiff's new employment so that the premiums Perfect Fence paid for its worker's compensation insurance coverage would be lower than they would have been if the insurer had been informed of plaintiff's new employment. (Ex 9, pp 4, 14-16.) And according to plaintiff, since Perfect Fence Company had failed to specifically let its worker's disability compensation insurance carrier know that it had hired plaintiff before his injury occurred, plaintiff could sue his employer for tort damages

in accordance with MCL 418.641(2), notwithstanding the exclusive remedy provision. (Ex 9, pp 26-27.) MCL 418.641(2) provides that if an employer fails to purchase any worker's disability compensation insurance, in violation of its statutory duty to do so under MCL 418.611(1), an injured worker may then bring a tort action against the uninsured employer for tort damages that otherwise would have been prohibited against the insured employer by the exclusive remedy provision in MCL 418.131(1).

But defendant Perfect Fence Company established that it had purchased worker's disability compensation insurance from Accident Fund Insurance Company, that it had maintained its worker's disability compensation insurance from Accident Fund Insurance Company continuously since 2007, that plaintiff had made a claim for worker's disability compensation insurance benefits from Accident Fund Insurance Company, and that plaintiff had already been paid and was continuing to be paid worker's disability compensation insurance benefits from Accident Fund Insurance Company. Accordingly, defendant Perfect Fence Company was entitled to the immunity from tort liability provided to insured employers by the exclusive remedy provision. (Ex 9, pp 6-7, 19-24.) Defendant Perfect Fence Company further established that the amount of the annual premium it paid for its worker's disability compensation insurance policy was determined by an annual audit conducted by an insurance agent at the end of each year, for which it then paid quarterly premiums four times during the following year. Since plaintiff's injury allegedly occurred in January of 2014, the amount of the premium to be paid by it (as a matter between it and its insurance company only, and not as anything that concerned plaintiff) would not even be determined until the annual audit that would occur at the end of 2014. (Ex 9, pp 6, 20.) The number of employees would fluctuate, individuals would come and go, and thus a policy audit would list the "average number of employees" during any given period. (See Ex E, p 1, also attached to plaintiff's brief in the Court

of Appeals, stating: "There were 9 average number of employees during audit period"; see also Ex 8B, pp 6-7, 40-41.)

At the November 7, 2014 hearing on defendant Perfect Fence Company's motion for summary disposition based on the exclusive remedy provision, Judge Power allowed the parties to submit additional briefs on the question of whether, when viewing the facts in the light most favorable to plaintiff (that is, assuming that defendant Perfect Fence Company had "hidden" from its worker's disability compensation insurance company the fact that it had hired plaintiff as an employee in order to obtain a lower premium cost for itself from the insurance company, which defendant Perfect Fence Company denied having done), Accident Fund Insurance Company was still legally obligated to provide worker's disability compensation insurance benefits to plaintiff, or whether it was not legally obligated to provide any worker's disability compensation insurance benefits to plaintiff but instead (for whatever reason) only voluntarily chose to pay worker's disability compensation insurance benefits to plaintiff. (Ex 9, pp 28-34.)

A second hearing on defendant's motion for summary disposition was conducted by Grand Traverse Circuit Chief Judge Power on December 19, 2014. (Ex 10.) At that hearing, argument was presented by counsel to Judge Power concerning both defendant Perfect Fence Company's motion for summary disposition based on the exclusive remedy provision, and also concerning plaintiff's motion to amend complaint seeking to add claims against Perfect Fence Company for intentional tort under the intentional tort exception to the WDCA's exclusive remedy provision, MCL 418.131(1).

At the December 19, 2014 hearing, it was noted that MCL 418.621(2) specifically obligates a worker's disability compensation insurance company such as Accident Fund Insurance Company in this case that issues a worker's disability compensation insurance policy to an employer in Michigan to insure and cover *all* the employees and all the activities of the employer. Thus, MCL

418.621(2) provides in pertinent part as follows:

> [E]ach insurer issuing an insurance policy to cover any employer . . . shall insure, cover, and protect in the same insurance policy, all the businesses, employees, enterprises, and activities of the employer. [MCL 418.621(2).]

At the December 19, 2014 hearing, Judge Power, after considering the briefs and arguments of counsel, made separate rulings as to defendant Perfect Fence Company's motion for summary disposition and as to plaintiff's motion to amend complaint.

In granting defendant Perfect Fence Company's motion for summary disposition, Judge Power found that plaintiff--who specifically admitted he was an employee of Perfect Fence and who had been paid and was being paid worker's disability compensation benefits by his employer Perfect Fence's worker's disability compensation insurer--was barred by the exclusive remedy provision of the WDCA from suing his employer Perfect Fence for additional money in tort damages for the injury he allegedly sustained in the course of his employment. Judge Power stated in part as follows:

> *THE COURT*: I'm taking the facts most favorable to you [plaintiff], that those people are scoundrels and they tried to deceive everybody by hiding this man's compensation and not paying insurance on it.
>
> * * *
>
> Okay. This case involves an individual, Mr. McQueer, who was working for Perfect Fence Company. And they were putting up a fence and apparently at some point they ran into some ground that was difficult to bore out, so that they could bore a hole and then put a fence post in.
>
> So somebody suggested, a supervisor, that Mr. McQueer hold the fence post. And the supervisor would use a Bobcat, which is a small front-end loader, really. Use the front-end loader to pound the stake into the ground.
>
> It's alleged that the stake fractured or something happened and . . . Mr. McQueer was hit in the head by the front-end loader. And it's alleged he suffered very substantial long-term permanent damages.
>
> Now, he--Perfect Fence Company was insured for workers' comp purposes by the Accident Fund. And the defense has been raised on behalf of Perfect Fence Company, that the exclusive remedy provision applies. Now, it isn't quite an exclusive remedy. What that says is, that the workers' comp claim is the workers' exclusive remedy for an injury suffered on the job; exclusive remedy at least vis-a-vis

the employer.

Now, that's not quite right, because as we'll discuss during the motion to amend, when we come back to that, there is an intentional tort exception. If the employer intended to injure the employee, then the exclusive remedy provision does not apply. But we'll get back to that when the amendment question comes up, amending the complaint.

But, in the meantime, there is an exclusive remedy provision. But there are a couple of questions about that. First, taking the facts most favorable to the plaintiff, it does appear there are facts to support the conclusion that Perfect Fence Company failed to disclose Mr. McQueer and his salary or wage to--to the workers' comp insurer; thereby, saving the premium that has to be paid, which is measured by the amount of the wage.

Furthermore, they had Mr. McQueer--and again, it's disputed. The claim is, Mr. McQueer wanted to do it this way. Taking the version most favorable to the plaintiff, would be, Mr. McQueer was placed, by Perfect Fence Company, on an independent contractor kind of arrangement. So there would be no social security or tax withholding. And he would be paid just money. And he would presumably be responsible for his own taxes.

And--so taking those versions, the Accident Fund apparently was not even aware of Mr. McQueer. They did, however, pay Mr. McQueer's workers' comp claim. The question that came up was, whether they did so because they were required to.

The reason I think that's important is, if they really didn't have coverage for Mr. McQueer, then you may trigger these penalty provisions we're going to go through in a minute. If they did have coverage for Mr. McQueer, then we have to look at the penalty provisions with that in mind.

It does appear that the statutes for workers' compensation require, that when a workers' comp policy is issued, that it, in fact, does cover all businesses and all employees of the employer. [See MCL 418.621(2).] And it appears that--I think that happens whether or not the employees are disclosed to the workers' comp carrier.

There does not appear to be any case law directly on point. I do have something that I discovered, that is similar. *Protective Insurance Company versus American Mutual Liability*; 143 Mich App 408, a 1985 case. This had to do with obligation of the--of the employer to insure under section 171, the employees for subcontractors, if the subs don't have workers' comp insurance.

And they said that in the American--*Protective Insurance versus American Mutual* case, they said that the insurance coverage for the employer, does cover these uninsured employees of a subcontractor. They're statutorily deemed employees; and,

therefore, they are covered under the policy, even though, presumably the insurer in that case, did not know about these deemed employees.

So I think that based on the language set forth in section 621 of the act, specifically subsection (2) and subsection (4)(e), it does appear that the Accident Fund policy covered Mr. McQueer, even though they were not aware of him and his existence and his compensation, taking the version most favorable to the plaintiff, had been hidden from the Accident Fund.

So that does--then you get to the question, that does seem to trigger the exclusive remedy provision. However--now, the case of *Smeester versus Pub-N-Grub*, 208 Mich App 308, at 1995 case, has been cited. But in that case it appears that the--that the employer in that case did *not have any* workers' comp insurance.

That's different than the circumstances we have here. Which is, he had workers' comp insurance and covered, even this unknown employee that had been hidden from the insurance company.

Now, the--the section 641(2) states: "The employee of an employer who violates provisions of section 171 or 611, shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment, notwithstanding the provisions of section 131," which I believe is the exclusive remedy provision we've been discussing, that the defendant relies on.

So question is, is Mr. McQueer an employee of an employer who has violated either 171 or 611?

Now, 611 is the general requirement to have workers' compensation insurance in place that covers the employee. Perfect Fence did that. Now, they may have been trying to deceive the insurer in order to cut their premiums. But they still, because of the statute, the policy issued by the Accident Fund does cover even this undisclosed employee.

So the question is, does it violate section 171? Now, 171 has to do with the circumstance that we discussed in the case of *Protective Insurance versus American Mutual Liability*, which we just discussed here. And that is **a circumstance where you have a business, they contract with somebody else, who then, themselves, hires employees to do the work.**

And those employees are not covered by a workers' comp policy, hired by the--provided by the subcontractor**. This says that** at least under certain circumstances, but generally, **the original business that--that hires the subcontractor, is liable for workers' comp coverage and has to have it.**

And it goes on to say that principals, which under the statute-- section 171 defines principal for purposes of this section only in subsection (1).

"If any employer subject to the provisions of this act in this section referred to as the principal, contracts with another person in this section, referred to as the contractor, who is not subject to this act or who has not complied with the provisions of 611, and who does not become subject to this act or comply with the provisions of section 611 prior to the date of injury or death, for which the claim is made.

The principal shall be liable to pay any person employed in the execution of the work, any compensation under this act. And--to which he or she would have been liable to pay if that person had been immediately employed by the principal."

So that subjects the first business to workers' comp liability; if the subcontractor or contractor hasn't got it him or herself. It then goes on to say in paragraph-- subsection (4), "Principals wilfully acting to circumvent the provisions of this section or section 611 by using coercion, intimidation, deceit, or other means to encourage persons who are otherwise to be considered employees, within the meaning of this act, to pose as contractors for the purpose of evading this section, or the requirements of 611--which is the one that generally workers' comp coverage--shall be liable, subject to the provisions of section 641."

Now, **it has to do in subsection (4) with "principals." So, again, that's somebody who is a business that is hiring subcontractor to do work. The contractor hires employees and fails to have coverage. That's not what we have here.**

So I don't think 171 applies. Even if it does, the purpose of Perfect Fence's deception, which taking the version most favorable to the plaintiff, it was, the purpose of Perfect Fence's deception was to avoid paying premium, not to avoid providing workers' comp insurance.

So for both those reasons, I don't think 171 applies. And since they [Perfect Fence] did provide insurance under 611 and did not violate section 171, I don't believe that the provisions of 641(2) apply. And--so I think the exclusive remedy provision applies and we'll grant summary disposition to--to defendant on that point.

Now, we'll make a note. I've got a room full of people. What I'm going to do is, we'll come back and deal with the motion to amend, which is related issues, here in a little bit. But I'm going to deal with these other people first. [Ex 10, pp 32-40 (emphasis added).]

Judge Power also denied plaintiff's motion to amend complaint at the December 19, 2014 hearing. Judge Power found that there was not sufficient evidence that defendant Perfect Fence Company intended to injure plaintiff, because there was not sufficient evidence regarding defendant

Perfect Fence having had actual knowledge that an injury to plaintiff was certain to occur and Perfect Fence having willfully disregarded that knowledge of certainty of injury, and that therefore it would be futile for plaintiff to amend his complaint to add a claim of intentional tort against his employer under MCL 418.131(1). Accordingly, Judge Power stated as follows:

> *THE COURT*: This is a motion to amend the complaint. I previously granted summary disposition, saying the exclusive remedy provision applies, because of workers' compensation; and, therefore, plaintiff's complaint is limited by that.
>
> The--the amended complaint is an attempt to add an intentional tort claim. Of course, if someone is injured intentionally by the employer, then the fact that workers' comp is the remedy, does not bar the action.
>
> In this case, the--the plaintiff was working for Perfect Fence Company. Someone with whom he worked, who we believe, for purposes of this motion, we'll accept as having been in charge of the work crew, the two people crew.
>
> He wanted to--they were installing fence posts. They got to a spot where apparently it was difficult, because of the high water and the watery mud to dig, auger out proper holes for the fence post to go in. And so he insisted on using the front end of a--I believe it's a Bobcat; a small front loader, basically.
>
> Using the front loader to force or pound the stakes into the ground, while Mr. McQueer helped. The plaintiff says--there's some dispute on this, but the plaintiff says that the owner of the company, Mr. Krumm, came by the site while this was going on.
>
> Instructed Mr. Peterson, who was in charge, not to do that, that that was dangerous. And then left. There is apparently testimony in the Krumm deposition in which he says, "That such a situation was guaranteed someone would get hurt." But there's no evidence that he said that statement to Mr. Peterson or to the plaintiff.
>
> But **he did tell them it was dangerous and not to continue. That's at least according to the version--the plaintiff's version.** Now, the test of whether something is intentional, is whether--whether the employer intended to injure the employee.
>
> Or--which is not the case here, I don't think anyone questions that. Or that the employee had actual--or the employer had actual knowledge that an injury was certain to occur. Now, we have, using the version most favorable to the plaintiff, Mr. Krumm, the owner of Perfect Fence, was there, saw the situation and told them not to do it and then left.

> **So he--he knew that there was a dangerous situation that was going on. I assume he thought he corrected it by telling them not to do it. But the supervisor on-site--and, again, that status may be disputed, Mr. Peterson, continued to do that.**
>
> **But the question is, does that show he intended to injure? Or does it show that he had actual knowledge that an injury was certain to occur? Now, I concentrate on the word "certain." It strikes me that this is not a situation where an injury is certain to occur.**
>
> You could probably pound in these posts with a front loader, and if you're careful and lucky, nobody gets hurt. But **this is a dangerous thing to do. But I don't think it's a situation in which injury is certain to occur. So I don't think it's --it's an intentional tort situation. And I think the amendment to add that would be futile.** So we'll deny that.
>
> * * *
>
> The guy got hurt and I don't doubt that it's a serious injury, but that's the workers' comp system. Of course, the price of giving up the right to sue the employer, was that employees get covered no matter even if it's completely their own fault, they get covered.
>
> If it wasn't for workers' comp, you would have an argument that Perfect Fence was negligent. Obviously, Mr. McQueer would have comparative negligence issues, anyway. It's a mess. Workers' comp is there, it is what it is.
>
> So I'm going to grant the summary disposition. And I'm going to deny the motion to amend the complaint. [Ex 10, pp 63-69 (emphasis added).]

Accordingly, Judge Power issued a written order on December 29, 2014, granting Perfect Fence Company's motion for summary disposition and denying plaintiff's motion to amend complaint. (Ex 11.) Plaintiff thereafter filed a claim of appeal in the Court of Appeals.

In the Court of Appeals, the case was assigned to Judges Douglas Shapiro, Joel Hoekstra, and Michael Talbot. (Ex 15.) Plaintiff McQueer obtained by motion a 56-day extension of the time for the filing of an appellant brief, and then obtained by a second motion a further 21-day extension for the filing of an appellant brief, and filed an appellant brief on August 4, 2015 (Ex 13); and defendant Perfect Fence filed an appellee brief on September 16, 2015 (Ex 14). The appeal was argued before Judges Shapiro, Hoekstra, and Talbot in the Court's Lansing courtroom on Thursday, April 7, 2016,

and the unpublished opinion of the Court of Appeals was issued on April 19, 2016. (Ex 15.)

The Court of Appeals opinion of Judges Shapiro, Hoekstra, and Talbot affirmed in part and reversed in part the circuit court's determinations and remanded the case to the circuit court.

As noted in an earlier section of this brief, the Court of Appeals opinion includes three holdings. The first holding affirms a determination of the circuit court, and is in favor of defendant Perfect Fence; and the second and third holdings reverse determinations of the circuit court, and are in favor of plaintiff.

First, the Court of Appeals held that the circuit court correctly determined that MCL 418.611(1)(b) does not apply in this case. MCL 418.611(1)(b) provides an exclusion to the exclusive remedy provision's barring of tort claims against an employer if the employer failed to maintain any insurance coverage for its worker's compensation liability. Here, defendant Perfect Fence Company maintained insurance coverage for its worker's compensation liability. Moreover, plaintiff received full worker's compensation benefits. (Ex 15, pp 4-5.) This issue was correctly decided and is not relevant in this application for leave to appeal.

Second, the Court of Appeals held that the circuit court incorrectly determined that MCL 418.171 does not apply in this case. MCL 418.171, known as the "principal employer" or "statutory employer" provision, provides an exclusion to the exclusive remedy provision's barring of tort claims against an employer if the employer (referred to as a "principal" in the statute) sought to circumvent its own obligation to maintain any worker's compensation insurance coverage by having coerced another person to pose as a contractor, and that contractor then engages other persons to work as employees. According to the Court of Appeals, this exclusion applies in this case because there is a genuine issue of material fact as to whether defendant Perfect Fence sought to circumvent its obligation to maintain worker's compensation insurance coverage by having coerced plaintiff

McQueer to pose as a contractor. (See Ex 15, pp 6-7.) However, defendant Perfect Fence actually did maintain worker's compensation insurance coverage, and full benefits under its worker's compensation policy were in fact paid to plaintiff McQueer. Moreover, plaintiff McQueer never engaged or hired any persons to work as his employees.

Third, the Court of Appeals held that the circuit court abused its discretion in denying plaintiff's motion to amend his complaint to add a claim for intentional tort against defendant Perfect Fence. In MCL 418.131(1), the only exception to the exclusive remedy provision is a legitimate claim against an employer that the employer committed an" intentional tort" against the employee that caused the employee's work injury. The statute states that "[a]n intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury," and that "[a]n employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." According to the Court of Appeals, the circuit court abused its discretion in denying plaintiff's motion to amend his complaint to add a claim for intentional tort against defendant Perfect Fence because the facts in this case are sufficient to support a finding of intentional tort. (See Ex 15, pp 7-10.) However, plaintiff McQueer himself admitted in his deposition testimony that Bob Krumm, a co-owner of defendant Perfect Fence, specifically told him (plaintiff McQueer) and his coworker Mike Peterson never to use the bucket of a Bobcat to push down fence posts into the ground, and plaintiff McQueer further admitted in his deposition testimony that his coworker Mike Peterson, who was using the bucket of the Bobcat to push down a fence post when the bucket struck plaintiff in the head, had simply "miscalculated" when pushing the bucket down on the fence post into the soggy ground, that "he didn't intentionally hit me," and that this accident was entirely "unforeseen." (See quotations from plaintiff's deposition transcript, *supra*.)

This application for leave to appeal concerns the two holdings of the Court of Appeals that reverse the circuit court's order (regarding the statutory employer provision of MCL 418.171, and the intentional tort exception of MCL 418.131(1)).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S HOLDING THAT THE EXCLUSIVE REMEDY PROVISION OF THE WORKER'S DISABILITY COMPENSATION ACT, MCL 418.131(1), BARS PLAINTIFF'S LAWSUIT FOR TORT DAMAGES AGAINST HIS DEFENDANT-EMPLOYER FOR INJURIES HE SUSTAINED WHILE IN THE COURSE OF HIS EMPLOYMENT, BECAUSE THE EXCLUSION TO THE EXCLUSIVE REMEDY PROVISION IN MCL 418.171 (KNOWN AS THE "STATUTORY EMPLOYER" EXCLUSION) DOES NOT APPLY IN THIS CASE

A. MCL 418.131(1) - the exclusive remedy provision

The exclusive remedy provision of the Michigan Worker's Disability Compensation Act (WDCA), MCL 418.131(1), provides that an employer's liability for injuries sustained by an employee is limited solely to the payment of worker's disability compensation benefits.

> The right to the recovery of benefits as provided in this act [i.e., the recovery of workers' compensation disability benefits] shall be the employee's exclusive remedy against the employer for personal injury. [MCL 418.131(1).]

In *Eversman v Concrete Cutting & Breaking*, 463 Mich 86, 92-93; 614 NW2d 862 (2000), this Court succinctly stated as follows: "An employee who suffers an injury arising out of and in the course of his employment will be eligible for [worker's disability] compensation regardless of whether the employer was at fault. In return, the employer is immunized from tort liability because the worker's compensation act, under MCL 418.131(1); MSA 17.237(131)(1), provides that this compensation is the exclusive remedy for a personal injury. . . ."

B. MCL 418.641(2) - two exclusions from the exclusive remedy provision, being Exclusion 1: MCL 418.611(1)(b), and Exclusion 2: MCL 418.171

MCL 418.641(2) provides that an employee of an employer who violates MCL 418.171 or

MCL 418.611 can bring a civil action against the employer because of a work injury notwithstanding the exclusive remedy provision:

> The employee of an employer who violates the provisions of section 171 or 611 shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of section 131. [MCL 418.641(2).]

C. Exclusion 1: MCL 418.611(1)(b) - employers must maintain coverage for worker's compensation liability (and defendant Perfect Fence did that in this case)

MCL 418.611(1) requires employers to maintain coverage for worker's compensation liability, either through self-insurance or by maintaining a worker's compensation insurance policy[4]:

> Each employer under this act, subject to the approval of the director, shall secure the payment of compensation under this act by either of the following methods:
>
> (a) By receiving authorization from the director to be a self-insurer. . . .
>
> (b) By insuring against liability with an insurer authorized to transact the business of worker's compensation insurance within the state.

In this case, both the circuit court and the Court of Appeals held that defendant Perfect Fence complied with the requirements of MCL 418.611(1) by maintaining a worker's compensation insurance policy. Therefore, the exclusion in MCL 418.641(2) to the exclusive remedy provision for an employer's violation of MCL 418.611(1)'s requirement to maintain security for the payment of worker's compensation benefits does not apply in this case.

D. Exclusion 2: MCL 418.171 - liability of "principal" or "statutory" employers

MCL 418.171 addresses what are commonly referred to as "principal" or "statutory" employers and was intended to protect employees of contractors and subcontractors who failed to

[4] The circuit court held, and the Court of Appeals affirmed, that MCL 418.611 was not violated by defendant Perfect Fence, because defendant Perfect Fence complied with that statute by insuring against liability for worker's compensation at the time of plaintiff's injury at work. (Ex 15, pp 4-5.) Plaintiff received full payment of worker's compensation benefits under defendant Perfect Fence's worker's compensation insurance policy. (Ex 8A, pp 44-45, 71, 136.)

procure worker's compensation insurance for those employees of contractors and subcontractors. *McCaul v Modern Tile and Carpet, Inc*, 248 Mich App 610, 620-621; 640 NW2d 589 (2001). It is intended to permit injured employees of contractors and subcontractors to be paid worker's compensation benefits from the worker's compensation carrier of a "statutory employer" or "principal" contractor under certain circumstances.

Under MCL 418.171(1), when a principal contractor contracts with a contractor or subcontractor, and that contractor or subcontractor fails to maintain security (or insurance coverage) for its liability to provide worker's compensation benefits to its own injured employees, the principal contractor becomes liable to pay the injured employees of the contractor or subcontractor all worker's compensation benefits which the injured employees would have been entitled to receive if the injured employees had been employed by the principal contractor. Under MCL 418.171(4), a principal who willfully used coercion, intimidation, or deceit to encourage employees to pose as contractors (employers) themselves, for the purpose of allowing the principal to evade its statutory obligation to maintain coverage for worker's compensation liability, becomes liable to the injured employees in a civil action. This statute is limited in scope and does not apply to this case.

MCL 418.171(3) (emphasis added) states that MCL 418.171 applies to a principal contractor and a contractor "*only if* the contractor engages persons to work" who would be employees (or, as stated by way of double negative in the statute, "only if the contractor engages persons to work *other than* persons who would *not* be considered employees").

MCL 418.171 provides as follows:

> (1) If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not complied with the provisions of section 611 . . . , the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by

the principal.

(2) If the principal is liable to pay compensation under this section, he or she shall be entitled to be indemnified by the contractor or subcontractor. The employee shall not be entitled to recover at common law against the contractor for any damages arising from such injury if he or she takes compensation from such principal. The principal, in case he or she pays compensation to the employee of such contractor, may recover the amount so paid in an action against such contractor.

(3) This section shall apply to a principal and contractor only if the contractor engages persons to work other than persons who would not be considered employees under section 161(1)(d).

(4) Principals willfully acting to circumvent the provisions of this section or section 611 by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees within the meaning of this act to pose as contractors for the purpose of evading this section or the requirements of section 611 shall be liable subject to the provisions of section 641.

E. MCL 418.171(4) does not apply to defendant Perfect Fence, because it is not a statutory employer or a principal contractor that hired contractors or subcontractors that themselves hired employees; and even if this statute could be applied to Perfect Fence, there is no evidence that Perfect Fence used coercion, intimidation, and deceit against plaintiff to get him to pose as a contractor or subcontractor for the purpose of Perfect Fence evading its statutory duty to maintain a policy of worker's compensation insurance--especially since Perfect Fence always maintained a policy of worker's compensation insurance

The trial court found that MCL 418.171--known as the "statutory employer" or "principal contractor" statute-- does not apply in this case. (Ex 10, pp 38-40.) The trial court held that the exclusive remedy provision in the WDCA, MCL 418.131(1), applies, so that plaintiff's exclusive remedy for any injury he sustained during the course and scope of his employment is worker's disability compensation insurance benefits.

But the Court of Appeals reversed the trial court's determination and held that MCL 418.171 applies in this case and that therefore plaintiff may sue his employer, defendant Perfect Fence under MCL 418.171(4) for money in tort damages for the alleged injury he sustained during the course of his employment. (Ex 15, p 6). According to the Court of Appeals, plaintiff is entitled to sue his

employer for tort damages, in spite of the exclusive remedy provision, because defendant Perfect Fence might have used "coercion, intimidation, deceit, or other means to encourage" plaintiff "to pose as [a] contractor[]," and "the purpose of the deceit was to prevent plaintiff from making a claim for worker's compensation benefits." (Ex 15, p 6.)

The problem with the Court of Appeals' conclusion is twofold. First, MCL 418.171 (the "statutory employer" or "principal contractor" statute) does not apply in this case at all (as the trial court correctly determined). And, second, even if it did apply, MCL 418.171(4) does not permit tort liability to be imposed on a "principal" or "statutory employer" who used coercion, intimidation or deceit unless that coercion, intimidation or deceit was used "for the purpose of evading this section [i.e., MCL 418.171] or the requirements of section 611 [i.e., the requirement to maintain security for worker's compensation liability]." More specifically, MCL 418.171(4) does not permit tort liability to be imposed on a principal or statutory employer who used coercion, intimidation or deceit for some *other* purpose--such as the purpose relied upon by the Court of Appeals, which was "the purpose of . . . prevent[ing] plaintiff from making a claim for worker's compensation benefits." (Ex 15, p 6.) The statute, by its plain language, does not cover that situation.

1. MCL 418.171 does not apply to this case at all

First, MCL 418.171 (the "statutory employer" or "principal contractor" statute) does not apply in this case at all (as the trial court correctly determined). That is because defendant Perfect Fence is not a "statutory employer" or a "principal contractor," and plaintiff was not a contractor or subcontractor who engaged other persons to work for him as his employees.

The trial court judge read the statute correctly to require a situation different than the situation in this case. The trial judge correctly read the statute as applying to a situation involving a business that hires a contractor or subcontractor to do work, and that contractor or subcontractor

then hires employees to do the work, but that contractor or subcontractor failed to have worker's compensation insurance for its employees, so that the original business then becomes a "statutory employer" or "principal contractor" and thus responsible to provide worker's compensation benefits to injured employees of a contractor or subcontractor. But that is not the situation in the instant case at all. As the trial court judge stated, "[section]171 has to do with . . . . a circumstance where you have a business, they contract with somebody else, who then, themselves, hires employees to do the work. And those employees are not covered by a workers' comp policy . . . provided by the subcontractor. . . . [So that] the original business that--that hire[d] the subcontractor, is liable for workers' comp coverage and has to have it. . . . **That's not what we have here**." (Ex 10, pp 38-39, emphasis added.)

The trial court's understanding of MCL 418.171 honors and applies the plain language of the statute. MCL 418.171(2) makes clear that it applies only where the principal has hired a contractor or subcontractor, and the principal has to pay worker's compensation benefits to an employee of that contractor or subcontractor because the contractor or subcontractor did not maintain its own worker's compensation insurance. It does this by stating that the principal shall be indemnified by the contractor or subcontractor, and may bring an action against the contractor or subcontractor to recover the amounts that the principal has paid to the contractor or subcontractor's employee. It further provides that the employee shall not have a common law cause of action against his or her employer, the contractor or subcontractor, if he or she takes money from the principal.

While this makes clear that MCL 418.171 was intended to apply only in situations involving a principal which retains another to do work, and that person in turn hires another person, defendant Perfect Fence further points out that to construe the statute otherwise would effectively render nugatory several other provisions of the WDCA. This is because other provisions of the WDCA

already obligate defendant Perfect Fence to pay worker's compensation benefits to plaintiff if plaintiff qualifies as an employee. Thus, MCL 418.171 must be interpreted as applying to situations not already covered by other provisions of the WDCA--namely, to situations where someone who would not be considered to be the principal's employee but nonetheless is entitled to receive worker's compensation benefits from the principal.

The trial court's understanding of MCL 418.171 and its consequent inapplicability to the instant case is also justified by statements in published appellate opinions. For example, in *McCaul v Modern Tile and Carpet, Inc*, 248 Mich App 610, 620; 640 NW2d 589 (2001), the Court of Appeals stated that § 171 was intended by the Legislature to protect employees of contractors and subcontractors who failed to procure adequate worker's compensation insurance:

> Section 171 was intended to protect employees of contractors and subcontractors who failed to procure adequate worker's compensation insurance. [*McCaul*, 248 Mich App at 620.]

In *Smith v Park Chemical Co*, 154 Mich App 180; 397 NW2d 260 (1986), the defendant hired a contractor to repair a roof. The contractor was uninsured for worker's compensation liability. An employee of the hired contractor was injured while performing the repair work. Therefore the defendant became liable under § 171 to pay worker's compensation benefits to the hired contractor's injured employee. Again, the Court of Appeals stated that § 171 was intended to protect employees of contractors and subcontractors against their employers' failure to obtain adequate worker's compensation benefits:

> Section 171 . . . was intended to protect employees of contractors and subcontractors against their employers' failure to obtain adequate workers' compensation insurance. *Smith*, 154 Mich App at 182.

Similarly, in *Blanzy v Brigadier General Contractors, Inc (On Remand)*, 240 Mich App 632, 639-640; 613 NW2d 391 (2000), the Court of Appeals stated that § 171 was intended by the

Legislature to protect employees of contractors and subcontractors who failed to procure adequate worker's compensation insurance[5]:

> The ostensible purpose of § 171 is to protect the employees of a subcontractor where the subcontractor fails to satisfy its obligation under § 611. In the event of a workplace injury, the noncompliant subcontractor's employee can obtain worker's compensation benefits from the general contractor. [*Blanzy*, 240 Mich App at 639-640.]

And similarly in *Burger v Midland Cogeneration Venture*, 202 Mich App 310, 314; 507 NW2d 827 (1993), the Court of Appeals stated that an employer can fall within § 171 as a statutory employer if it contracted with another employer who was not subject to the WDCA or who failed to comply with § 611's requirement of maintaining worker's compensation liability insurance:

> An employer qualifies as a statutory employer under § 171 if it contracted with another employer not subject to the act or who has not complied with § 611 of the act, MCL 418.611. [*Burger*, 202 Mich App at 314.]

It is believed that this statute has never been applied in a case such as the instant case, in which the employer maintains a policy of worker's compensation insurance and the injured plaintiff has been paid worker's compensation benefits under that policy and yet is permitted to sue the employer for tort damages.

Moreover, MCL 418.171 itself specifically states that it applies to a principal and contractor "only if" the contractor engages persons to work[6]:

> (3) This section shall apply to a principal and contractor only if the contractor engages persons to work other than persons who would not be considered employees

[5] Please note that in *Blanzy*, the Court of Appeals also finds that § 171 was not intended to cover an injured person who is in essence both the uninsured subcontractor and that subcontractor's injured employee. As the Court of Appeals states, "[i]t strains reason to believe that § 171 was intended to afford coverage" to such an injured employee of a noncompliant subcontractor, and "[t]here is no policy reason to allow a one-person subcontractor operation to profit from the failure of that person to comply with the worker's compensation statute." *Blanzy*, 240 Mich App at 640.

[6] It appears that the reference in MCL 418.171(4) to MCL 418.161(1)(d), which was accurate before statutory amendments to § 161 in 1985 and thereafter, should now refer to MCL 418.161(1)(n), which defines "employee" as used in the WDCA.

under section 161(1)(d).

In this case, according to the Court of Appeals, § 171 applies to defendant Perfect Fence because defendant Perfect Fence was a principal, and plaintiff McQueer was a contractor. However, again, this § 171 was intended to apply to situations involving an employer (known as a principal of statutory employer) who contracts with another employer (known as a contractor) who engages other persons to work. Defendant Perfect Fence never contracted with another employer. Plaintiff McQueer never engaged other persons to work.

In sum, MCL 418.171 is simply not applicable in this case. The trial court judge correctly recognized this. (Ex 10, pp 38-39.)

Accordingly, defendant Perfect Fence asks this Court to reverse the holding of the Court of Appeals as to this issue and to reinstate the trial court's holding that MCL 418.171 simple does not apply in this case.

2. Even if MCL 418.171 could apply to this case, MCL 418.171(4) does not apply against defendant Perfect Fence

According to the Court of Appeals, MCL 418.171(4) applies against defendant Perfect Fence because there is a question of fact as to whether Perfect Fence used "coercion, intimidation, deceit, or other means" to encourage plaintiff McQueer to pose as a contractor. (Ex 15, p 6.) According to the Court of Appeals, "[i]t can reasonably be inferred that the purpose of the deceit was to prevent plaintiff from making a claim for worker's compensation benefits," and that inferred purpose "would in turn allow defendant to avoid liability under sections 171 or 611 of the WDCA." (Ex 15, p 6.)

What the Court of Appeals does here is to *judicially re-write the statutory language* in MCL 418.171(4). Instead of requiring, as the plain language of the statute requires, that the coercion, intimidation, or deceit to encourage persons to pose as contractors *"for the purpose of evading this section or the requirements of section 611*," the Court of Appeals would require that the coercion,

intimidation, or deceit to encourage persons to pose as contractors be "for the purpose of preventing a plaintiff from making a claim for worker's compensation benefits." But the statute does not say that. The statute does not mention anything about coercion, intimidation, or deceit for the purpose of preventing someone from making a claim for worker's compensation benefits as a basis for subjecting the party who committed the coercion, intimidation, or deceit to the provisions of section 641 (and hence to tort liability). The Legislature did not choose to include language in the statute that coercion, intimidation or deceit encouraging persons to pose as contractors for the purpose of "preventing a plaintiff from making a claim for worker's compensation benefits" was sufficient to subject the party who committed the coercion, intimidation, or deceit to the provisions of section 641. Instead, the language that the Legislature chose to include in the statute as passed into law was that the coercion, intimidation or deceit encouraging persons to pose as contractors needed to be committed "*for the purpose of evading this section or the requirements of section 611*." MCL 418.171(4) (emphasis added).

The Legislature's rationale for drawing this distinction is easily ascertained. If the coercion, intimidation or deceit is for the purpose of evading having to purchase worker's compensation insurance or to pay benefits to someone who is an employee of a contractor or subcontractor, then the person can *never* apply for and receive worker's compensation insurance. If, however, there is already a policy of worker's compensation insurance in place, then the injured worker can make a claim directly against the insurer. Thus, any coercion, intimidation or deceit by the employer is rendered benign.

In this case, defendant Perfect Fence could not have committed any coercion, intimidation or deceit encouraging plaintiff to pose as a contractor for the purpose of avoiding MCL 418.171, because that statute--which applies when statutory employers or principal contractors contract with

other employers, such as contractors of subcontractors--is not even applicable in this case, since this case does not involve any principal employer or any contractor employer (who employed employees). Moreover, in this case, defendant Perfect Fence could not have committed any coercion, intimidation or deceit encouraging plaintiff to pose as a contractor for the purpose of avoiding the requirements of section 611 (which requires an employer to maintain insurance coverage for its worker's compensation liability), because Perfect Fence did in fact always maintain insurance coverage for its worker's compensation liability (as both the trial court and the Court of Appeals recognized).

The Court of Appeals simply re-writes the language of MCL 418.171(4) to provide that, instead of coercion, intimidation or deceit being used to encourage persons to pose as contractors "for the purpose of evading this section or the requirements of 611," it is sufficient that coercion, intimidation or deceit be used to encourage persons to pose as contractors "for the purpose of preventing a plaintiff from making a claim for worker's compensation benefits." Whether the Legislature's language in MCL 418.171(4) or the Court of Appeals' alternative language for MCL 418.171(4) is better public policy or is preferred for some other reason is not the point. The Legislature's language in MCL 418.171(4) must be respected by the judiciary, and a court should not change the Legislature's language and replace it with language that the court might prefer.

The plain language of the statute does not include the Court of Appeals' suggestion that the liability under MCL 418.641 may be imposed against an employer who uses coercion, intimidation or deceit to encourage persons to pose as contractors "for the purpose of preventing the person from making a claim for worker's compensation benefits." The suggestion that the statute should include such language should be addressed, if at all, not to any judges, but rather to the Michigan Legislature, where public policies for the state, and the burdens to be placed upon all employers in the context

of statutorily created worker's compensation liability, are properly to be debated and decided. Plaintiff's suggestion for extended liability under MCL 41 8.171(4) "should be raised to their state representative or senator for debate within the halls of our Legislature, not to the Judiciary." *Curry v Meijer, Inc*, 286 Mich App 586, 599; 780 NW2d 603 (2009), lv den 486 Mich App 961 (2010). As this Court has consistently and recently reiterated, "[i]t is the legislators who establish the statutory law because the legislative power is exclusively theirs." *Michigan Coalition of State Employees Unions v Michigan*, 498 Mich 312, 331, n 40; 870 NW2d 275 (2015) (citation omitted). "We may presume that the Legislature intended the meaning of the words used in the statute, and we may not substitute alternative language for that used by the Legislature." *Michigan Ass'n of Home Builders v City of Troy*, 497 Mich 281, 288; 871 NW2d 1 (2015). "[P]olicy debates" are to be conducted, and "policy choices" are to "be made, in the Legislature." *In re Bail Bond Forfeiture*, 496 Mich 320, 342, n 8; 852 NW2d 747 (2015), Young, J, conc. "[A]rguments that a statute is unwise or results in bad policy should be addressed to the Legislature." *Michigan v CVS Caremark Corp*, 496 Mich 45, 61, n 34; 852 NW2d 103 (2014). "[W]e decline to second-guess the wisdom of the Legislature's policy decisions." *Wurtz v Beecher Metropolitan District*, 495 Mich 242, 255; 848 NW2d 121 (2015).

Thus, MCL 418.171(4) does not apply here, and so plaintiff is barred as a matter of law from recovering additional money in tort damages in a civil action against his employer, Perfect Fence. MCL 418.131(1).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO AMEND HIS COMPLAINT TO ADD A CLAIM OF INTENTIONAL TORT UNDER THE INTENTIONAL TORT EXCEPTION TO THE EXCLUSIVE REMEDY PROVISION OF THE WORKER'S DISABILITY COMPENSATION ACT, MCL 418.131(1), BECAUSE THAT CLAIM IS FUTILE

As already stated above in Section I, the exclusive remedy provision of the WDCA, MCL 418.131(1), provides that an employer's liability for injuries sustained by an employee is limited solely to the payment of worker's disability compensation benefits. And there is no dispute in this case that plaintiff has received worker's compensation benefits as paid by the worker's compensation insurer of his employer, defendant Perfect Fence.

However, there is one narrow exception to the exclusive remedy provision: if the plaintiff-employee's claims against the employer are proven to rise to the level of being an "intentional tort," as defined by statute, committed by the employer against the injured employee.

A. The intentional tort exception to the WDCA's exclusive remedy provision

Under the intentional tort exception to the exclusive remedy provision, an employer may be held liable to pay tort damages to an injured employee if the employee can prove that his or her injury was caused by the employer's "intentional tort": that is, if the employee can prove that the employer **specifically intended to injure** the plaintiff by having had **actual knowledge** that an injury was **certain** to occur to the plaintiff and yet **willfully disregarded** that knowledge.

> **The only exception to this exclusive remedy is an intentional tort**. An intentional tort shall exist **only** when an employee is injured as a result of a deliberate act of the employer and **the employer specifically intended an injury**. An employer shall be deemed to have intended to injure **if the employer had actual knowledge** that an **injury was certain to occur** and **willfully disregarded that knowledge**. [MCL 418.131(1) (emphasis added).]

This intentional tort exception was added by the Michigan Legislature to the WDCA's exclusive remedy provision in 1987. (See Public Act No. 28 of 1987.) Before the 1987 statutory amendment, there was no intentional tort exception in the exclusive remedy provision. This intentional tort exception to the exclusive remedy provision has been described as being "quite narrow." *Thomai v MIBA Hydramechanica Corp*, 303 Mich App 196, 213; 842 NW2d 417 (2013),

rev'd on other grounds 496 Mich 854; 847 NW2d 254 (6-18-2014).

B. The standard for determining what constitutes an "intentional tort" for purposes of the intentional tort exception to the WDCA's exclusive remedy provision

Case law over the past twenty years has clarified that the intentional tort exception to the exclusive remedy provision provides that an employer may be deemed to have committed an intentional tort in only two ways: (1) by deliberately acting or deliberately failing to act with the intent to cause an injury to the employee, or (2) by possessing actual knowledge that an injury is certain to occur to the employee and willfully disregarding that knowledge. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997), lv den 458 Mich 854 (1998); see also *Travis v Dreis and Krump Mfg Co*, 453 Mich 149, 169-180; 551 NW2d 132 (1996), reh den sub nom *Golec v Metal Exchange Corp*, 453 Mich 1205 (1996).

To commit an intentional tort within the first category, the employer must be shown to have specifically intended to inflict an injury upon the employee. The Court of Appeals, citing former Supreme Court Justice Patricia Boyle's separate opinion in *Travis*, *supra*, has emphasized that "a plaintiff must plead (and then be able to prove) that the employer engaged in a deliberate act (commission or omission) with specific intent to injure," and that "[a]n employer has the intent to injure when the employer acts or fails to act with 'the particular purpose of inflicting an injury upon his [or her] employee." *Thomai v MIBA Hydramechanica Corp*, 303 Mich App 196, 211; 842 NW2d 417 (2013), rev'd on other grounds 496 Mich 854; 847 NW2d 254 (6-18-2014).

To commit an intentional tort within the second category, it must be shown that the employer possessed actual knowledge that an injury was certain to occur to the employee and willfully disregarded that knowledge. Under this category, an employer's negligence, gross negligence, recklessness, or deliberate indifference, is not sufficient, and it is also not sufficient that an employer

disregarded knowledge that a dangerous condition actually existed. *Palazzola*, 223 Mich App at 176; *Gray v Morley*, 460 Mich 738, 744-745; 596 NW2d 922 (1999). Nor is it enough that the employer acted with reckless disregard for the health, safety, and welfare of employees. *Bock v General Motors Corp*, 247 Mich App 705, 712-713; 637 NW2d 825 (2001). Instead, "willful disregard" requires that an employer "disregards **actual knowledge** that an injury is **certain** to occur." *Travis*, 453 Mich at 179 (emphasis added).

It is well established that "[a]n incident 'certain to occur' cannot be established by reliance on the laws of probability or the mere occurrence of a similar event." *Alexander v Demmer Corp*, 468 Mich 896; 660 NW2d 67 (2003), citing *Travis*, 453 Mich at 174-175; see also *Gray v Morley*, 460 Mich 738, 741-745; 596 NW2d 922 (1999). To the contrary, a plaintiff must allege a specific danger **known** to the employer that was **certain** to result in an injury, and further must show that the employer required the plaintiff to work in the face of that known, specific danger which was certain to result in the injury sustained. *Herman v Detroit*, 261 Mich App 141, 148; 680 NW2d 71 (2004), lv den 471 Mich 906 (2004); *Gray, supra*. Thus, the Court of Appeals has emphasized that an injury is not "certain to occur" unless "there is no doubt that it will occur" and that "[a]n employer's awareness . . . or knowledge that an accident is likely, does not constitute actual knowledge that an injury is certain to occur." *Bagby v Detroit Edison Co*, 308 Mich App 488, 492-493; 865 NW2d 59 (2014). The United States Sixth Circuit Court of Appeals has similarly stated that an employee "must show that '**no doubt** exists with regard to whether (an injury) will occur" and that "the employer **knows** the condition will cause an injury and refrains from informing the employee about it." *House v Johnson Controls, Inc*, 248 Fed Appx 645, 647-649 (CA 6, 2007) (emphases in original). See also *Thomai v MIBA Hydramechanica Corp*, 496 Mich 854; 847 NW2d 254 (6-18-2014), rev'g 303 Mich App 196, 211; 842 NW2d 417 (2013) (no evidence that the defendant-

employer had knowledge that injury was certain to occur to the plaintiff-employee where the employer required the employee to continuously operate a groove-cutting machine that had been modified by the employer so as to force the employee to operate the machine at a rate twice as fast as before the modification, that did not have adequate guarding on it to protect the employee, that was perpetually leaking oil, and that the employer refused to fix or to rectify these dangers).

Thus, the threshold is "extremely high" in summary disposition cases such as the instant case, in which the plaintiff seeks to state a prima facie case of intentional tort against an employer in order to get around the Legislature's exclusive remedy provision that otherwise grants the employer blanket immunity from tort liability. Indeed, the Court of Appeals has cautioned the bench and bar that in summary disposition cases, the "intentional tort" exception to the exclusive remedy provision presents an " 'extremely high standard' of proof that cannot be met by reliance on the laws of probability, [or] the mere prior occurrence of a similar event." *Palazzola*, 223 Mich App at 149; and see *Saveski v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued 10-6-2009 (Docket No. 287308); 2009 WL 3199538, lv den 485 Mich 1082 (2010) (Ex 12) ("the evidentiary threshold in such cases is extremely high")[7]; see also *Thomai v MIBA Hydramechanica Corp*, 303 Mich App 196, 211; 842 NW2d 417 (2013), rev'd on other grounds 496 Mich 854; 847

[7] This unpublished appellate opinion of *Saveski, supra*, is cited here because it acknowledges the "extremely high standard" of proof applicable to this "true intentional tort" statutory standard. Moreover, this Court has noted that the "true intentional tort" statutory standard that is now to be used for determining whether an intentional tort was committed is the result of a Legislative rejection of the lower "substantially certain" standard that had previously been applied by this Court. In *Gray v Morley*, 460 Mich 738, 742, n 2; 596 NW2d 922 (1999), this Court stated as follows:

> Through 1987 PA 28, the Legislature amended the exclusive remedy provision of the WDCA, so as to specifically provide for an intentional tort exception. In doing so, it rejected the "substantially certain" test previously announced by this Court in *Beauchamp v Dow Chemical*, 427 Mich 1; 398 NW2d 882 (1986), and adopted the more rigorous "true intentional tort" standard as the proper test for determining the presence of an intentional tort. See, e.g., 6 Larson, Workers' Compensation Law, § 68.15(e) at 13-110 (observing "[t]he Michigan Legislature reacted to *Beauchamp* with impressive swiftness").

NW2d 254 (6-18-2014) ("very high standard" applies such that the plaintiff, in response to the defendants' motion for summary disposition, must "establish that the defendants wilfully disregarded knowledge that an injury was certain to occur to the plaintiff from his operation of the . . . machine"). The *Palazzola*, *Saveski*, and *Thomai* cases were all decided by way of summary disposition.

C. The circuit court did not abuse its discretion in finding that it would be futile for plaintiff to amend his complaint to raise the claim of intentional tort against defendant Perfect Fence, because plaintiff's proofs failed to show that defendant Perfect Fence had actual knowledge that plaintiff's unanticipated and unforeseen injury was certain to occur and that Perfect Fence willfully disregarded that knowledge, especially where plaintiff himself has testified under oath that no one at Perfect Fence ever intended for him to be hurt

In the Court of Appeals, plaintiff argued that the circuit court erred in denying plaintiff's motion to amend his complaint to add a claim of "intentional tort" because plaintiff "ma[d]e out a viable claim under § 131(1)'s intentional tort exception to the exclusive remedy provision of the WDCA." (See Plaintiff's Court of Appeals Brief, p 24.) And the Court of Appeals stated that the circuit court "abused its discretion" because "the facts as presented by plaintiff are sufficient to support a finding of intentional tort." (Ex 15, p 10.) However, there simply are no facts to support any reasonable person concluding that plaintiff's unanticipated, unforeseen, unexpected, and never-before-occurring injury rose to the high level of being an intentional tort under Michigan law. In short, the circuit court judge got it right, and the Court of Appeals judges got it wrong. Or, more precisely, the circuit court did not "abuse its discretion" in any way.

Plaintiff himself testified that his coworker, Mike Peterson, who was acting as the supervisor on this particular fence-post job and who was operating the Bobcat and its bucket that hit plaintiff in the head, did *not* intentionally hit plaintiff. No one had ever been injured by any bucket of any Bobcat in the long history of Perfect Fence Company. No one had ever been injured in the forty-year history of Perfect Fence Company. Plaintiff testified that even he did not foresee the possibility

of getting hit in the head by the bucket while he and Peterson were working together. Plaintiff testified that a day or two before the incident, Bob Krumm, the part-owner of Perfect Fence, had seen Peterson using a bucket of a Bobcat to push down a fence post and that he (Bob Krumm) told Peterson *not* to do that in the future because it was dangerous.[8] Plaintiff testified that, unbeknownst to Bob Krumm, Peterson and plaintiff decided to violate Krumm's direct order and to do exactly what he told them *not* to do: namely, to use the Bobcat's bucket to push a fence post down into the ground again. Plaintiff, who already knew that his boss had specifically told him not to do this, testified that he just "went along" with it. Plaintiff testified that he positioned himself behind the post while Peterson used the bucket of the Bobcat to push the fence post down into the soggy ground,[9] and that he also chose to continue talking on his cell phone to his girl friend at that same time. Plaintiff testified that the bucket hit him on the head when the fence post unexpectedly entered some water beneath the surface of the ground in the soggy, marshy area they were working in, so that suddenly the bucket descended faster than anyone had anticipated.

[8] Actually, as plaintiff's brief in the Court of Appeals acknowledged, Bob Krumm--in the presence of *both* Peterson and plaintiff--said: "that's dangerous as hell, *you guys* better not do that." (Plaintiff's Court of Appeals Brief, p 22; Ex 8A, p 76 (emphasis added).) So both Peterson *and plaintiff* were told *not* to perform work by using the bucket on the Bobcat to push down a fence post. However, when Peterson began using the bucket of the Bobcat to push down the fence post where plaintiff was ultimately injured, plaintiff did not tell Peterson to stop doing what they had both specifically been told *not* to do; and plaintiff did not even bring up the matter with Peterson. Instead, plaintiff "just went along" with doing what he had specifically been told *not* to do. (Ex 8A, pp 78-79.)

[9] The Court of Appeals opinion asserts that "Plaintiff alleges and presents evidence that his supervisor, Peterson, was the direct creator of the 'continuously operative dangerous condition' *by directing plaintiff to stand under the Bobcat bucket*." (Ex 15, p 8, emphasis added.) With all due respect, defendant believes it is inaccurate to assert that plaintiff alleged or presented evidence that Peterson directed plaintiff to stand under the Bobcat bucket. Instead, plaintiff himself testified that at the time of the incident he was sitting on his knees *behind* the post that was being pushed down by the Bobcat bucket, so that the post was situated *between* him and Peterson. Plaintiff testified that he was sitting "*behind* the post on my knees and my butt, and he would come up to it, in front of it (indicating) right here -- and the post is *between* me and him -- and with the edge of the bucket he would push it down." (Ex 8A, pp 83-84, emphasis added.) According to plaintiff, the Bobcat "slipped *back*." (Ex 8A, p 84, emphasis added.)

No one at Perfect Fence had actual knowledge that an injury was certain to occur while plaintiff and Peterson were doing their job of installing fence posts or that they would use the bucket of a Bobcat to push a fence post into the ground--against their boss's direct instruction *not* to do that. First, plaintiff has acknowledged that neither Peterson nor anyone else ever intended to cause any injury to plaintiff. (Ex 8A, pp 82, 112.) Second, for forty years, no one had ever been injured on any job while working at Perfect Fence, much less by the bucket of any Bobcat. (Ex 8B, p 29.) Third, not even plaintiff could foresee ever getting injured ("bapped in the head") in this manner. (Ex 8A, pp 84, 88.) Fourth, Peterson and plaintiff had already been instructed by their boss *not* to use the bucket of the Bobcat to push down a fence post, but, unbeknownst to anyone else, Peterson and plaintiff did exactly what they were instructed not to do. (Ex 8A, pp 76-79.) Fifth, the bucket hit plaintiff in the head only after the fence post being pushed down unexpectedly hit an unknown pocket of water beneath the surface of the ground and suddenly moved downward more quickly than either Peterson or plaintiff had expected it to move. (Ex 8A, p 84.) Sixth, plaintiff himself described this accident as happening because Peterson had simply "over-calculated it." (Ex 8A, p 84.) Seventh, plaintiff and Peterson had all the proper digging tools with them for doing the job the right way, without using any Bobcat bucket at all. (Ex 8A, pp 80; Ex 8B, p 55.) In sum, this incident was an accident, and not an intent to injure anyone. No one at Perfect Fence had actual knowledge that an injury to plaintiff was certain to occur and yet disregarded that knowledge.[10]

In defendant's view, this incident can truly be described as an "accident," in the sense that

[10] Circuit Judge Power succinctly and correctly stated as follows regarding the accident in this case: "Mr. Krumm . . . told them not to do it. . . . But the supervisor on-site . . . Mr. Peterson, continued to do that. . . . . But the question is, does that show he intended to injure? Or does it show that he had actual knowledge that an injury was certain to occur? Now, I concentrate on the word 'certain.' It strikes me that this is not a situation where an injury is certain to occur. You could probably pound in these posts with a front loader, and if you're careful and lucky, nobody gets hurt. But this is a dangerous thing to do. But I don't think it's a situation in which injury is certain to occur. So I don't think it's--it's an intentional tort situation. And I think the amendment to add that would be futile." (Ex 10, pp 65-66.)

it was an "unfortunate happening that occurs unintentionally." *Random House Webster's College Dictionary* (1999). It was something that occurred only after plaintiff's coworker and plaintiff himself unforeseeably decided to completely ignore their boss's direct instruction not to use the bucket of a Bobcat to push down a fence post and because the fence post being pushed down unforeseeably and unexpectedly hit an area of water beneath the surface of the ground so that the post suddenly began to descend faster than anyone (including plaintiff himself) had calculated or anticipated. There simply was no evidence that anyone at Perfect Fence had actual knowledge that an injury was certain to occur to plaintiff and that such knowledge was willfully disregarded.

D. The Court of Appeals analysis of this issue ignores the applicable test for determining whether an "intentional tort" occurred, which is whether the defendant-employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge, and instead finds that the circuit court abused its discretion on the ground that plaintiff was subjected to a continuously operative dangerous condition, even though that ground was never raised by any party before, was not decided by the trial court, and is legally irrelevant in this case

The Court of Appeals states that the circuit court improperly determined whether an "intentional tort" occurred for purposes of deciding whether plaintiff's motion to file an amended complaint raising an "intentional tort" claim was futile. According to the Court of Appeals, "[i]nstead of determining whether an injury was probable on any given use of the Bobcat with a man beneath it, the trial court should have determined whether Peterson subjected plaintiff 'to a continuously operative dangerous condition' that he knew would cause an injury." (Ex 15, p 9.) The Court of Appeals cites *Travis*, 453 Mich at 178, 182, 186, for this proposition. However, the issue of whether plaintiff was subjected to a "continuous operative dangerous condition" as a basis for granting plaintiff's motion to amend his complaint to add a claim of "intentional tort" was never raised or mentioned by plaintiff in his appellant's brief in the Court of Appeals, and, instead, plaintiff argued that the defendant-employer "had actual knowledge that an injury was certain to occur and

wilfully disregarded that knowledge." (See Ex 13, p 23.)

The Court of Appeals erred when it deviated from the circuit court's correct analysis of this "intentional tort" issue as determined by whether the defendant-employer had actual knowledge that an injury was certain to occur to plaintiff and willfully disregarded that knowledge, and incorrectly inserted sua sponte the issue of "continuous operative dangerous condition." That is because the theory of "continuous operative dangerous condition" as a basis for establishing intentional tort cannot apply in this case, because, according to this Court in *Travis*, in order for that theory to be applicable, the employee must have been subjected to a continuously operative dangerous condition which the employer "refrains from informing the employee about." There is no doubt in this case, according to plaintiff's own testimony, that his employer specifically told him and Peterson that using a bucket of a Bobcat to push down a fence post is "dangerous as hell" and that he and Peterson were "not [to] do that." (Ex 8A, p 76.)

In *Travis*, this Court stated that a continuously operative dangerous condition may form the basis of an intentional tort *if* the employer knows that the dangerous condition will cause an injury *and yet refrains from informing the employee about the dangerous condition*:

> When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, *yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured*, a factfinder may conclude that the employer had knowledge that an injury is certain to occur. [*Travis*, 453 Mich at 178 (emphasis added).]

Thereafter, in *Alexander v Demmer Corp*, 468 Mich 896; 660 NW2d 67 (2003), this Court again emphasized that a continuously operative dangerous condition may form the basis of a claim under the intentional tort exception *only if* the employer *refrains from informing the employee about the dangerous condition*:

> A continuously operative dangerous condition may form the basis of a claim under the intentional tort exception *only if the employer* knows the condition will

> cause an injury and *refrains from informing the employee about it.* [*Alexander*, 468 Mich 896 (emphasis added.)]

In this case, plaintiff's employer did not *refrain* from informing plaintiff about the dangerous condition. Instead, it did exactly the opposite: it *informed* him of the dangerous condition--and in no uncertain terms. His boss, Bob Krumm, specifically and bluntly instructed plaintiff, according to plaintiff's own sworn testimony, that "[t]hat's dangerous as hell" and "you guys better not do that." (Ex 8A, p 76.) According to plaintiff, Mr. Krumm "got mad and told us not to do it no more. And he was pissed." (Ex 8A, p 76.) Mr. Krumm could not have done more to stop plaintiff from encountering the dangerous condition that plaintiff and his coworker created and encountered. See also *Bagby v Detroit Edison Co (On Remand)*, 308 Mich App 488, 496-497; 865 NW2d 59 (2014) ("Defendant did not refrain from telling Bagby or other employees that the line was energized and dangerous," and "there is no evidence that defendant hid from Bagby or other employees the fact that the line was energized.")

In essence, an employer must have hidden a known danger from an employee or intentionally refrained from telling the employee about a known danger for this "continuously dangerous operative condition" theory to be applicable. *Travis*, 453 Mich at 178; *Alexander*, 468 Mich 896; *Bagby*, 308 Mich App at 496-497. That is exactly the opposite of what happened in this case.

On May 17, 2016--which was approximately one month after the Court of Appeals released its unpublished opinion in the instant *McQueer* case on April 19, 2016--another panel of the Court of Appeals released an unpublished opinion in the case of *Luce v Kent Foundry Co*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2016 (Docket No. 327978); 2016 Mich App LEXIS 969 (Judges Riordan, Saad, and Markey) (Ex 16). Simply stated, the *Luce* panel of the Court of Appeals "got it right," where the *McQueer* panel "got it wrong." The *Luce* panel properly reiterates and applies the "continuously operative dangerous condition" test as enunciated in this

Court's *Travis* opinion, and in its opinion the *Luce* panel italicizes the critical language in that test, as follows: "the employer must have knowledge of the condition *and refrain from informing the employee about it*. *Johnson* [*v Detroit Edison Co*, 288 Mich App 688, 698], citing *Travis*, 453 Mich at 178." (Emphasis in original.) The *Luce* panel then accurately emphasizes that "[t]he key is that the employee is left in the dark about the danger he is to encounter." Id.

The Court of Appeals in this case completely ignored the proper standard of the "continuously operative dangerous condition" theory as has been enunciated by this Court and by the Court of Appeals in other cases. It applied the wrong standard and as a result came to the wrong conclusion. The trial court applied the correct standard and as a result came to the right conclusion. It ignored half of the applicable test and ignored the undisputed fact that defendant Perfect Fence did not refrain from informing plaintiff about subject danger but instead did the opposite: it specifically informed him about that danger and further specifically instructed him not to engage in it.

The Court of Appeals opinion in this case relies on *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706; 777 NW2d 205 (2009), for the proposition that plaintiff in this case was subjected to a "continuously dangerous operative condition." (Ex 15, p10.) However, in *Fries*, the opinion of the Court of Appeals specifically states that the plaintiff, who was injured when some loose clothing she was wearing got caught in an automatic OBI-11 stamping press and pulled her arm into the press, "testified that she had not operated the OBI-11 before the date of her accident, *and had not received any warning concerning the risk of wearing loose clothing while running the machine*." *Fries*, 285 Mich App at 709 (emphasis added). Again, that is the *opposite* of the situation in the instant case, where plaintiff was specifically warned of the danger of using the bucket of a Bobcat to push down a fence post and was specifically instructed "not to do that" before the injury occurred.

The Court of Appeals' reliance in this case on the "continuously dangerous operative

condition" theory as fulfilling plaintiff's burden of establishing that his employer had actual knowledge that an injury was certain to occur is legally wrong and directly contrary to this Court's enunciation of that theory in its seminal *Travis* opinion and in its *Alexander* opinion, as well as contrary to the Court of Appeals' enunciation of that theory in its *Bagby* and *Fries* and *Luce* opinions. Far from having hidden any danger from plaintiff, plaintiff's employer explicitly told plaintiff about the danger of using the bucket of a Bobcat to push down a fence post and specifically instructed him *not* to do that.

Accordingly, the Court of Appeals incorrectly found that the circuit court abused its discretion in finding that it would be futile for plaintiff to amend his complaint to raise the claim of "intentional tort" against his employer in this case.

RELIEF REQUESTED

Defendant Perfect Fence Company asks this Court to peremptorily REVERSE the opinion of the Court of Appeals as to the two issues raised in this application and to reinstate the circuit court's order as to these two issues; or, in the alternative, to grant this application for leave to appeal.

GARAN LUCOW MILLER, P.C.

Date: May 31, 2016.

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/s/ David M. Shafer
John E. McSorley (P17557)
David M. Shafer (P34787)
Christian C. Huffman (P66238)
Attorneys for Def. Perfect Fence Co.
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207-2641
Telephone: (313) 446-1530

EXHIBITS

1 Defendant's Motion for Summary Disposition and Brief in Support of Motion, with Exhibits A-I

2 Plaintiff's Response to Defendant's Motion for Summary Disposition and Brief in Support, with Exhibits A-H

3 Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Disposition

4 Plaintiff's Additional Briefing in Opposition to Defendant's Motion for Summary Disposition, with Exhibits A-H

5 Defendant's Supplemental Brief Supporting its Motion for Summary Disposition, with Exhibits A-B

6 Plaintiff's Supplement to Plaintiff's Additional Briefing, with Exhibits 1-4

7 Plaintiff's Motion to Amend Complaint and Brief in Support of Motion, with Exhibits 1-10

8 Defendant's Response to Plaintiff's Motion to Amend Complaint, with Exhibits A-B

9 Transcript of Motion Hearing on November 7, 2014

10 Transcript of Motion Hearing on December 19, 2014

11 Order Granting Defendant's Motion for Summary Disposition and Denying Plaintiff's Motion to Amend Complaint, dated December 29, 2014

12 *Saveski v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued 10-6-2009 (Docket No. 287308); 2009 WL 3199538, lv den 485 Mich 1082 (2010)

13 Plaintiff-Appellant McQueer's Brief on Appeal in Court of Appeals

14 Defendant-Appellee Perfect Fence Company's Brief on Appeal in the Court of Appeals

15 *McQueer v Perfect Fence Co*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2016 (Docket No. 325619); 2016 Mich App LEXIS 761

16 *Luce v Kent Foundry Co*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2016 (Docket No. 327978); 2016 Mich App LEXIS 969

STATE OF MICHIGAN

IN THE SUPREME COURT

DAVID J. McQUEER,

Plaintiff-Appellee,

v

PERFECT FENCE COMPANY,

Defendant-Appellant.
_____/

Supreme Court Case No. _____

Court of Appeals
Case No. 325619

Grand Traverse Circuit Court
Case No. 14-030287-NO

PROOF OF SERVICE

Proof of Service: I certify that a copy of **DEFENDANT-APPELLANT PERFECT FENCE COMPANY'S APPLICATION FOR LEAVE TO APPEAL** and this **PROOF OF SERVICE** were served on the following parties as indicated below:

Date of Service: May 31, 2016

Signature: /s/ Enis J. Blizman
Enis J. Blizman

VIA ESERVICE	**VIA EFILING**
Mark Granzotto, Esq. Mark Granzotto, P.C. Attorneys for Plaintiff-Appellant 2684 Eleven Mile Rd., Suite 100 Berkley, MI 48072 Telephone: (248) 546-4649 Email: mg@granzottolaw.com	Clerk of the Court Grand Traverse Circuit Court Grand Traverse County Courthouse 328 Washington Street, Suite 300 Traverse City, MI 49684

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